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Closing Comments of Professor King and Discussion

COMMENT, Professor King: Every year at this time we have a session where we look to the future, a session on where do we go from here? I would like to get some discussion on possibilities for the future.

We probably will have the makings of a new trade agreement in place and certainly that presents some interesting aspects that warrant consideration.

The talk today can be turned into something that might present some interesting implications about legal economic relationships for a conference next year. Some possibilities for the future could include broader subjects such as law and politics in the North American context. That's a different type of approach which I style as a big picture approach. Either fortunately or unfortunately such a topic would involve a lot of politicians, some of whom have been known to send aides as substitutes to conferences where they were scheduled to speak. We had enough trouble with the ambassadors this time, both of whom weren't able to attend but we benefited greatly from Leonard Legault's talk, which I thought was superb. So are there any suggestions from the group here as to the future?

Howard Knopf, you have got a very fertile mind, let's hear from you.

COMMENT, Mr. Knopf: Well, as you said, the question of free trade is obviously going to be on peoples' minds very much a year from now. I believe this from what little I know about the timetable, either by way or figuring out how to implement an agreement—assuming it is still in an advancing state at that point—or possibly by way of post-mortem analysis as to why it has failed or is tottering. There is just no way of knowing what the outcome will be.

One topic that would relate to free trade and to some of the other things that we have talked about, especially dispute settlement, might be the concept of political and legal sovereignty. One hears a great deal about this in the free trade context; whether or not a dispute settlement mechanism is needed. If it is needed, the question is whether it is to be a supernational governmental institution. There is a dispute settlement mechanism in Europe, and I understand it is slowly but surely becoming more important. The state of sovereignty is going to be very important in regard to the GATT in the years to come. Certain countries will try to make the GATT more important through changes in the dispute settlement mechanism that currently exists. In this way, the countries realize greater possibilities under the GATT. All of this involves variations on

the theme of sovereignty. Perhaps it is too abstract, but I think it is going to be timely next year or whenever.

COMMENT, Professor King: One idea could possibly involve some version of a conference on dispute resolution, both in the comparative domestic context and the international context. Another approach could look at what Jim Fleck said here today and focus on the legal obstacles to Canada/U.S. competitiveness, a subject which I think is interesting. What are the legal roadblocks to our competitiveness? These are just some preliminary thoughts and we may develop them into something.

COMMENT, Mr. Marshall: One topic that would be timely might involve the issues in the implementation of an agreement, vis-à-vis the regulated industries, not necessarily the high tech ones, which we looked at last year, but national energy boards, the whole range of financial services, and so on. It is clear that there is not going to be much harmonization here, so people are going to be trying to play on the same field with different rules.

COMMENT, Professor King: Yes. Some aspect of the service industry may be a good point of focus.

COMMENT, Mr. Marshall: Trade lawyers are going to have to get more involved in services.

COMMENT, Professor King: Yes. Some aspect of services would be an interesting topic. At the luncheon table yesterday, the Dean of the Case Western Reserve University Law School raised the question of legal services in a free trade area. For example, could you have people qualified to practice law in both areas? The Canadians at our table naturally said it would take some time. It might take quite awhile.

COMMENT, Mr. Marshall: It might be easier than provincial intergration.

COMMENT, Professor King: That's another aspect, but I would like to get all our suggestions on the table today. We should look also at what the speakers think might be an appropriate theme.

QUESTION, Mr. Miller: Maybe a conference could be based around the theme of changing attitudes. I think that would reflect the changing attitudes towards business and I think dispute resolution involves a change in attitude. Free trade agreements will involve changing attitudes including reversing that one-way mirror that does exist. Maybe that could be a broad umbrella theme under which you could examine various specifics. How attitudes are changing? How to bring about changing attitudes? How to deal with innovation?

ANSWER, Professor King: Innovation is a very good one. Basically when you look at what Mr. Fleck was talking about, one of the keys to the edge that the United States and Canada have had on the Japanese is that we're innovators to a greater extent than they are. We need to take a look at that so that we preserve it. Innovation is a very interesting topic.

QUESTION, Mr. O'Grady: Just sort of feeding on that and going back to your earlier idea, the legal rules that facilitate innovation could be examined in a conference. I'm thinking of the Chinese, who are apparently trying to design a commercial law, from scratch, that would suit the modern world in the 21st century. If we were to focus on that, what would you see in your existing legal system that might have to be rethought from scratch?

ANSWER, Professor King: In the long run, that's the key to our competitive success vis-à-vis the Japanese and the developing countries. Not as much innovation has come from them. In many areas, we are still the center of innovation and because it is probably the key to our survival in the long run, I think that's an interesting topic.

One of the problems which was stated by Ivan Feltham regarding innovation is that innovation requires some R&D and a long-term view. General Electric, whom he represents, and IBM and others have seen the stock market look at what the quarterly report says rather than the long-term view. GE has attempted to meet that by having different payoff dates on different industries, so they have mixed it up. That's a tough one.

COMMENT, Mr. Keith: I've enjoyed what I think is a superb conference and one idea could be the changing role of lawyers in the legal profession and the way they operate in Canada and the United States. I'm thinking of what Howard Knopf and I were discussing the other night. We talked about the number of lawyers now in government who are not necessarily practicing even as government lawyers, in a traditional way, but who are still involved in legal questions and advising governments on legal, political, and economic issues. That also encompasses, of course, the way the private profession is organized in practices.

The second thing is the role of the constitution in Canadian life and perhaps comparison with the way the Canadian Constitution has evolved as compared with the U.S. Constitution.

COMMENT, Professor King: I have tried to put together something like that. That's a tough one to get our arms around, but it's appropriate because we will be celebrating our anniversary too. Those are good ideas. They are hard to mobilize into a sequence on a weekend. Any other suggestions?

COMMENT, Mr. Veillette: One topic might involve the contingent liability system and where it would fit in a free trade area. I would imagine if the contingent liability system here in the States poured over into Canada along with a free trade law, plaintiff lawyers would migrate en masse to Canada. Fortunately, I think the immigration process would prevent that.

Another area could be the comparison of employee rights in the United States with employee rights in Canada. The comparison could

include employee protection statutes, common law, and legislative actions.

COMMENT, Professor King: Anything that hits at innovation is something that is going to hurt us. The problem is how to put the concept together. The labor issue is something that we hit with Richard Lyon and Don Carter and did very well, but perhaps it was superficial and needs to be explored in-depth.

One thing that would be very helpful on these suggestions, so that we could record them, would be to drop me a line. It is very important that the Institute gets your help. That's the value in these sessions. We have had suggestions which blossomed into our next conference. I think we also have to look ahead into the future. What is next year going to be like?

Obviously the implementation of the Free Trade Agreement is going to be an important aspect. But the world outside is going to be as competitive as ever and we still have to deal with this subject of competitiveness. That's another real theme, because both Canada and the United States are going to be prosperous if they are competitive in the world context. The nature of the game involves a market which is global. It is easy to say, but it's true, and it is more and more true every day. Any other questions or comments?

Give me your thoughts on this conference. I would like to get them; on the proceedings, how it has been conducted, good and bad, any comments, whether critical or otherwise, because the conference is grass-roots-based and we want to be responsive to your feelings.

COMMENT, Mr. O'Grady: While it is on my mind, I would like to mention something about sovereignty. Part of what we have seen this weekend is a possible problem with the U.S. Congress and the traditions of U.S. constitutional law in even coming to grips with the question of delegating some limited form of decision-making to an extraterritorial body.

COMMENT, Professor King: In the joint ABA/CBA working group of which I was the U.S. chairman, we met this issue by taking treaties as the subject of third-party disputes by neutrals. Now, we said basically when the countries signed a treaty, that they had already conceded some sovereignty. So that was the cloak or the hook on which we hung the push for third-party dispute settlement, but it is very, very hard to get the U.S. Senate to do it too.

That's one of the areas that might warrant some remarks at a luncheon speech or something like that. But the joint working group of the two bar associations bit the bullet on that. We said that disputes involving treaties where there already had been some sort of sovereignty concession with the signing of the treaty should go to third-party arbitration.

Treaty law is governed by the Vienna Convention and the Law of

Treaties. It is known; it is certain. It's not like some areas of customary international law.

That's an interesting thought, but I would like to get letters from you on what we should cover in the future. Give it some thought on your way back and let me hear from you.

Well, I want to close this conference. As a matter of first instance, I want to thank our speakers. The caliber of the speakers and their ability to communicate was as high as I have seen at conferences which I have attended. Subjects like taxes, for example, were very entertaining and interesting with Messrs. Brown and White. On other subjects, like environmental law and labor law, we scratched the surface. We got into them, but not in too much depth and they were still very interesting, because the scope of the talks was broad and the speakers did their homework.

The papers will be published in Volume 12 of the *Canada/U.S. Law Journal*. All attendees at the conference will receive a copy of the proceedings.

We have had much help in conjunction with the conference. Matt Kadish has been great in assembling the Conference materials and in other respects. Renee Chudakoff certainly got the speakers to get their abstracts in on time. She got us off to a head start on the work of the proceedings and I'm grateful to her.

Patty Hujarski who was with us during the entire conference was also effective and I compliment her. She's secretary of the conference which is important. Our court reporter, Kerry Paul, has heard an awful lot of fast, and sometimes not too clear, speech but she's been with us at all times and she's very good. I think this has been a successful conference and I declare it adjourned.

